A

Malayan Banking Bhd v Punjab National Bank

B

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-75–11 OF 2020(W)
NALLINI PATHMANATHAN, ZALEHA YUSOF AND HARMINDAR SINGH FCJJ
23 MAY 2022

C

Banking — Letters of credit ('LC') — Principles — Whether bank issuing LC governed by UCP-600 had to give negotiating bank Notice of Refusal if it did not wish to honour its reimbursement undertaking on ground documents presented did not comply with terms of the LC — Whether failure to give notice of refusal would preclude issuing bank from claiming documents presented did not constitute a complying presentation — Whether issuing bank could not refuse to honour reimbursement undertaking on grounds not stated in its notice of refusal — Whether negotiating bank was fully entitled to determine manner of negotiation of the document — Whether negotiating bank was only required to ascertain if there was complying presentation by examining the face of the documents and was not required to go behind the documents and undertake further inquiry

D

E

The instant appeal was against the Court of Appeal's setting aside of a High Court decision ordering the respondent ('Punjab Bank') to pay the appellant ('Maybank') USD1,983,765.65 ('the money') as reimbursement of that sum that Maybank had paid to the seller of goods ('the seller') under a letter of credit ('LC') issued by Punjab Bank at the request of the buyer of the goods ('the buyer'). Under the LC — which was governed by the provisions of the Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication No 600 ('UCP-600') — Punjab Bank irrevocably undertook to reimburse the negotiating bank (Maybank) upon the maturity of the LC. When the Seller presented the documents specified in the LC to Maybank for payment, Maybank, after satisfying itself that the documents were in order, paid the money to the Seller and thereafter sought reimbursement from Punjab Bank. Punjab Bank, however, declined to reimburse on the ground that the documents presented by the Seller contained a discrepancy, to wit, the bill of lading ('BL') did not comply with the terms of the LC in that it was (purportedly) issued and signed by a freight forwarder and not by the shipper. Punjab Bank informed Maybank that the buyer was unwilling to waive the alleged discrepancy and therefore the reimbursement could not be made. Maybank sued Punjab Bank for recovery of the money with interest. Apart from the alleged discrepancy in the BL, Punjab Bank, in its defence, inter alia, also alleged that the money was Maybank's loan to the seller and not a

F

G

H

I

negotiation of the LC and in support of that contention relied upon the fact that Maybank had disbursed the money to the seller even before the LC's maturity date. In granting judgment to Maybank, the High Court held, inter alia, that on its face, the BL complied with the terms of the LC and Punjab Bank was bound to honour its reimbursement undertaking. The Court held that the bank's notice of refusal to honour the undertaking was invalid as the notice was not sent directly to Maybank as required by the UCP-600. In setting aside the High Court's decision, the Court of Appeal ('COA') held that: (a) the LC required presentation by the Seller of an ocean BL and not a freight forwarder BL; (b) releasing the money to the Seller based on a freight forwarder BL was a fundamental breach of the LC and not merely a discrepancy; (c) a notice of refusal was not required to be given if it was a case of a fundamental breach of the LC; even so, in the instant case, a valid notice of refusal had been given; (d) given that the facts of the case contained many 'sham methodologies' inconsistent with the terms of the LC, Maybank should have called the seller to testify at the trial and because it failed to do so, an adverse inference had to be invoked against Maybank; and (e) the release of the money to the seller before the maturity date of the LC supported the view that the disbursement was, in fact, a loan to the seller from Maybank. Maybank was granted leave to appeal to the Federal Court on the following three questions of law: (i) if an issuing bank determined that the documents presented did not constitute a complying presentation, should that bank still give notice of refusal under the UCP-600 to the negotiating bank regardless of the nature of the non-compliance and, if it failed to do so, was the issuing bank precluded from claiming that the documents presented did not constitute a complying presentation and was obliged to honour its reimbursement undertaking; (ii) in determining whether documents presented under a LC governed by the UCP-600 constituted a complying presentation, was a negotiating bank only required to ascertain from the face of the documents whether or not they constituted a complying presentation; and (iii) where a LC governed by the UCP-600 expressly stated that it was available for negotiation by any bank in Malaysia, could an issuing bank avoid its reimbursement obligation on grounds not stated in the notice of refusal and which related to the manner of negotiation of the documents presented under the LC.

Held, unanimously allowing the appeal, setting aside the COA's decision and restoring the High Court's decision:
Leave questions 1 and 2 (answered in the affirmative):

(1) The ground relied upon by Punjab Bank that the bills of lading ('BL') presented by the seller did not comply with the LC as they were issued and signed by a freight forwarder was wholly untenable. A cursory look at the BL did not show that they were issued and signed by a freight forwarder. On its face, the BL was signed by Diffreight Agencies (M) Sdn Bhd as agent on behalf of the carrier, Diffreight. Nothing on the face of

the BL indicated that Diffreight Agencies was a freight forwarder. Although Punjab Bank's witness, DW1, claimed otherwise, no evidence was led to prove that Diffreight Agencies was a freight forwarder. Hence, the claim that the BL was issued and signed by a freight forwarder remained a bare assertion and was wholly misconceived. At any rate, even if it was established that Diffreight Agencies was a freight forwarder, the fact that they signed 'as agent on behalf of the carrier Diffreight' meant that the BL was indeed an ocean BL. It could not therefore be a freight forwarder's BL as accepted by the COA (see paras 28–30).

(2) The bank examining a presentation was only required to examine whether the documents appeared on their face to constitute a complying presentation (article 14(a) UCP-600). Banks were not required to go beyond the face of the documents. To impose a duty to investigate beyond the documents, as suggested by the COA, was both unrealistic and burdensome to banks. In the commercial world, prompt payments were often crucial and it would not be commercially justified for banks to hire investigators to go behind the shipping transactions or other arrangements. The efficacy of LC, which was the lifeblood of international trade, would be severely undermined. It was sufficient for banks to examine documents with reasonable care to ascertain if they appeared on the face to be in accordance with the terms and conditions of the credit (see para 31).

(3) The COA appeared to have conflated the separate issues of strict compliance with the terms of a LC with the standard for examination of documents under the UCP-600. Accordingly, it was erroneous for the COA to have insisted that Maybank should have been concerned with whether the goods under the LC had been shipped or delivered to the buyer. This finding was contrary to the well-established rule that in LC transactions, banks dealt with documents and not with goods. In the circumstances, as found by the High Court, Maybank was justified in saying that the BL presented by the seller in this case appeared on its face to constitute a complying presentation (see paras 32–33).

(4) The COA's view that a notice of refusal was not required to be given if the documents presented breached a fundamental term of the LC was untenable as it went against the express provisions in article 16 of the UCP-600 which imposed a strict obligation on an issuing bank to give notice of refusal to the negotiating bank if it refused to honour its reimbursement undertaking on the ground that the documents did not constitute a complying presentation (see para 26).
Leave question 3 (answered in the negative):

(5) Pursuant to article 16 of UCP-600, an issuing bank must give a single notice of refusal to the negotiating bank if it wished to refuse to honour on the ground of non-compliance with the terms of the LC. If the issuing

bank failed to raise a particular ground in its notice of refusal, it was precluded from raising it after the expiry of the period stipulated for giving a notice of refusal. Punjab Bank's sole reason for rejecting the documents at the material time was alleged discrepancies in the documents. It did not raise any issue on the manner of negotiation of the documents by Maybank. As such, on settled principles, Punjab Bank was not entitled to raise that issue to avoid reimbursing Maybank. In any case, Maybank, as the negotiating bank, was fully entitled to determine the manner of negotiation of the documents. It was entitled to pay the seller in advance, in anticipation of receiving a complete set of the original documents. The manner of negotiation of the documents could not constitute a defence to Maybank's claim and was wholly irrelevant to Punjab Bank's obligation to reimburse Maybank. Pursuant to article 7(b) of UCP-600, Punjab Bank's obligation to reimburse Maybank arose upon its receipt of the complete set of original documents from Maybank on 3 December 2011 (see paras 35–38 & 41).

(6) Payment by Maybank to the seller before the maturity date of the LC was entirely consistent with negotiation of the documents presented by the seller under the LC. The COA was plainly wrong to hold that the payment had to do with a separate loan transaction between Maybank and the seller. As correctly held by the High Court, the evidence at trial showed that Maybank had paid USD1,983,765.65 to the seller pursuant to negotiation of the documents under the LC. There was therefore no need for Maybank to call the seller as a witness; hence, the COA was plainly wrong to invoke an adverse inference against Maybank for failing to call the seller as a witness (see para 40).

[Bahasa Malaysia summary

Rayuan ini adalah terhadap keputusan Mahkamah Rayuan yang mengenepikan keputusan Mahkamah Tinggi yang memerintahkan responden ('Punjab Bank') membayar perayu ('Maybank') USD1,983,765.65 ('wang') sebagai pembayaran balik jumlah yang telah dibayar oleh Maybank kepada penjual barangan ('penjual') di bawah surat kredit ('LC') yang dikeluarkan oleh Punjab Bank atas permintaan pembeli barangan tersebut ('pembeli'). Di bawah LC — yang ditadbir oleh peruntukan Kastam dan Amalan Seragam untuk Kredit Dokumentari, Semakan 2007, Penerbitan ICC No 600 ('UCP-600') — Punjab Bank secara tidak boleh ditarik balik untuk membayar balik bank perundingan (Maybank) apabila LC tersebut matang. Apabila penjual mengemukakan dokumen yang dinyatakan dalam LC kepada Maybank untuk pembayaran, Maybank, selepas berpuas hati bahawa dokumen-dokumen tersebut teratur, membayar wang itu kepada penjual dan selepas itu meminta pembayaran balik daripada Punjab Bank. Punjab Bank, bagaimanapun, enggan membayar balik dengan alasan bahawa dokumen yang dikemukakan oleh penjual mempunyai percanggahan, iaitu, bil muatan ('BL') tidak

mematuhi syarat-syarat LC kerana ianya (kononnya) dikeluarkan dan ditandatangani oleh pengangkut barang dan bukan oleh pengirim. Punjab Bank memberitahu Maybank bahawa pembeli tidak mengambilkira percanggahan yang dikatakan dan oleh itu pembayaran balik tidak dapat dibuat. Maybank menyaman Punjab Bank untuk mendapatkan semula wang itu dengan faedah. Selain daripada percanggahan yang dikatakan dalam BL, Punjab Bank, dalam pembelaannya, antara lain juga mendakwa bahawa wang tersebut adalah pinjaman Maybank kepada penjual dan bukan rundingan LC dan untuk menyokong hujahan tersebut, mereka bergantung kepada fakta bahawa Maybank telah mengeluarkan wang tersebut kepada penjual walaupun sebelum tarikh matang LC. Dalam memberikan penghakiman kepada Maybank, Mahkamah Tinggi berpendapat, antara lain, secara amnya, BL mematuhi syarat-syarat LC dan Punjab Bank terikat untuk menghormati akujanji pembayaran baliknya. Mahkamah berpendapat bahawa notis keengganan bank untuk menghormati akujanji tersebut tidak sah kerana notis tersebut tidak dihantar terus kepada Maybank seperti yang dikehendaki oleh UCP-600. Dalam mengenepikan keputusan Mahkamah Tinggi, Mahkamah Rayuan ('MR') berpendapat bahawa: (a) LC memerlukan pembentangan oleh penjual BL dan bukan penghantar barang BL; (b) melepaskan wang tersebut kepada penjual berdasarkan pengangkut barang BL adalah pelanggaran asas LC dan bukan percanggahan biasa; (c) notis penolakan tidak perlu diberikan sekiranyya ianya merupakan pelanggaran asas LC; walaupun begitu, dalam kes ini, notis penolakan yang sah telah diberikan; (d) memandangkan fakta-fakta kes tersebut mengandungi banyak 'metodologi palsu' yang tidak konsisten dengan syarat-syarat LC, Maybank sepatutnya memanggil penjual untuk memberi keterangan di dalam perbicaraan dan oleh kerana gagal berbuat demikian, satu anggapan berbalik terpaksa diberikan terhadap Maybank; dan (e) pelepasan wang tersebut kepada penjual sebelum tarikh matang LC menyokong pandangan bahawa pembayaran tersebut, sebenarnya, adalah pinjaman kepada penjual dari Maybank. Maybank diberi kebenaran untuk merayu kepada Mahkamah Persekutuan atas tiga persoalan undang-undang berikut: (i) sekiranya bank yang memberikan pinjaman memutuskan bahawa dokumen yang dikemukakan tidak merupakan pembentangan yang sah dan bank tersebut memberikan notis penolakan di bawah UCP-600 kepada bank perunding tanpa mengira ketidakpatuhan dan, sekiranya ia gagal berbuat demikian, adakah bank yang memberikan pinjaman dihalang daripada menyatakan bahawa dokumen yang dikemukakan tidak mematuhi pembentangan tersebut dan diwajibkan untuk menghormati akujanji pembayaran balik; (ii) dalam menentukan sama ada dokumen yang dikemukakan di bawah LC oleh UCP-600 merupakan pembentangan yang dipatuhi, hanya bank yang merunding yang diperlukan untuk memastikan sama ada mereka membentuk pembentangan tersebut; dan (iii) di mana LC ditadbir oleh UCP-600 dengan jelas menyatakan bahawa mereka bersedia untuk rundingan oleh mana-mana bank di Malaysia, bolehkah bank yang memberi pinjaman mengelakkan kewajipan pembayaran balik atas alasan yang

tidak dinyatakan dalam notis penolakan dan yang berkaitan dengan cara rundingan dokumen yang dibentangkan di bawah LC.

Diputuskan, sebulat suara membearkan rayuan, mengenepikan keputusan MR dan mengekalkan keputusan Mahkamah Tinggi:
Soalan 1 dan 2 (dijawab secara afirmatif):

(1) Alasan yang diguna oleh Punjab Bank bahawa bil muatan ('BL') yang dikemukakan oleh penjual tidak mematuhi LC kerana ianya dikeluarkan dan ditandatangani oleh pengangkut barang adalah tidak dapat dipertahankan sepenuhnya. Mahkamah mendapati bahawa BL tidak menunjukkan bahawa ianya dikeluarkan dan ditandatangani oleh pengangkut barang. Pada dasarnya, BL telah ditandatangani oleh Diffreight Agencies (M) Sdn Bhd sebagai ejen bagi pihak syarikat penerbangan, Diffreight. Tiada sebarang pernyataan di atas BL menunjukkan bahawa Agensi Diffreight adalah penghantar barang. Walaupun saksi Punjab Bank, DW1, mendakwa sebaliknya, tiada keterangan yang membuktikan bahawa Diffreight Agency adalah penghantar barang. Oleh itu, tuntutan bahawa BL dikeluarkan dan ditandatangani oleh pengangkut barang adalah pernyataan kosong. Walau apa pun, walaupun didapati bahawa Diffreight Agencies adalah penghantar barang, hakikat bahawa mereka menandatangani 'sebagai ejen bagi pihak pembawa Diffreight' bermakna bahawa BL memang BL di laut. Oleh itu, ianya tidak boleh menjadi BL penghantar barang seperti yang diputuskan oleh MR (lihat perenggan 28–30).

(2) Bank yang memeriksa pembentangan hanya diperlukan untuk memeriksa sama ada dokumen-dokumen tersebut mematuhi syarat-syarat peembentangan yang sah (perkara 14(a) UCP-600). Bank tidak perlu bertindak melebihi perkara yang dicatatkan dokumen. Untuk mengenakan kewajipan untuk menyiasat di luar dokumen, seperti yang dicadangkan oleh MR, adalah tidak masuk akal dan membebankan kepada bank. Dalam dunia komersial, pembayaran segera adalah penting dan secara komersial tidak perlu bagi bank untuk mengupah penyiasat untuk menyiasat transaksi penghantaran atau urusan yang lain. Keberkesanan LC, yang merupakan perkara asas perdagangan antarabangsa, akan terjejas teruk. Adalah mencukupi bagi bank untuk memeriksa dokumen dengan urusan yang munasabah untuk memastikan sama ada mereka mematuhi terma dan syarat kredit (lihat perenggan 31).

(3) MR telah menggabungkan isu-isu berasingan mengenai pematuhan ketat dengan syarat-syarat LC dengan syarat untuk pemeriksaan dokumen di bawah UCP-600. Oleh itu, adalah salah bagi MR untuk memutuskan bahawa Maybank sepatutnya mengambilkira barangan di bawah LC telah dihantar atau dihantar kepada pembeli. Keputusan ini

bertentangan dengan undang-undang mantap bahawa dalam urus niaga LC, bank berurusan dengan dokumen dan bukan dengan barangan. Dalam keadaan ini, seperti yang diputuskan oleh Mahkamah Tinggi, Maybank adalah betul dengan menghujahkan syarat-syarat pembentangan BL telah dipatuhi (lihat perenggan 32–33).

(4) Keputusan MR bahawa notis penolakan tidak perlu diberikan sekiranya dokumen yang dikemukakan melanggar syarat asas LC tidak dapat dipertahankan kerana bertentangan dengan peruntukan di dalam perkara 16 UCP-600 yang mengenakan kewajiban pada bank yang memberikan pinjaman untuk memberi notis penolakan kepada bank perunding sekiranya mereka enggan menghormati akujanji pembayaran baliknya kerana dokumen tersebut tidak mematuhi syarat-syarat pembentangan (lihat perenggan 26).

Soalan 3 (dijawab secara negatif):

(5) Menurut penjual 16 UCP-600, bank yang memberikan pinjaman haruslah memberikan notis penolakan kepada bank perunding sekiranya mereka ingin menolak atas alasan tidak mematuhi syarat-syarat LC. Sekiranya bank yang memberikan pinjaman gagal memberikan alasan tertentu di dalam notis penolakannya, mereka adalah dihalang untuk memberikan alasan tersebut selepas tamat tempoh yang ditetapkan. Satu-satunya sebab Bank Punjab untuk menolak dokumen tersebut pada setiap masa material adalah terdapat percanggahan dalam dokumen. Mereka tidak membangkitkan sebarang isu mengenai cara rundingan dokumen oleh Maybank. Oleh itu, Punjab Bank tidak berhak untuk membangkitkan isu tersebut untuk mengelakkan pembayaran balik Maybank. Walau apa pun, Maybank, sebagai bank perunding, berhak sepenuhnya untuk menentukan cara rundingan dokumen tersebut. Mereka berhak membayar penjual terlebih dahulu sebelum menerima satu set lengkap dokumen asal. Cara rundingan dokumen tidak boleh menjadi pembelaan kepada tuntutan Maybank dan tidak relevan sepenuhnya dengan kewajipan Punjab Bank untuk membayar balik Maybank. Menurut perkara 7(b) UCP-600, kewajipan Punjab Bank untuk membayar balik Maybank timbul apabila dia menerima set lengkap dokumen asal dari Maybank pada 3 Disember 2011 (lihat perenggan 35–38 & 41).

(6) Bayaran oleh Maybank kepada penjual sebelum tarikh matang LC adalah selaras dengan rundingan dokumen yang dikemukakan oleh penjual di bawah LC. MR adalah jelas terkhilaf dengan memutuskan bahawa pembayaran tersebut mempunyai kaitan dengan transaksi pinjaman berasingan antara Maybank dan penjual. Seperti yang diputuskan dengan betul oleh Mahkamah Tinggi, keterangan semasa perbicaraan menunjukkan bahawa Maybank telah membayar USD1,983,765.65 kepada penjual menurut rundingan dokumen-dokumen di bawah LC.

A Oleh itu, tiada keperluan untuk Maybank memanggil penjual sebagai saksi; oleh itu, MR dengan jelas terkhilaf untuk membuat anggapan berbalik terhadap Maybank kerana gagal memanggil penjual sebagai saksi (lihat perenggan 40).]

B **Cases referred to**

China New Era International Ltd v Bank of China (HK) Ltd & Ors [2010] 5 HKC 82, CA (folld)
Gian Singh & Co Ltd v Banque de L'Indochonie [1974-1976] SLR(R) 83 (refd)

C **Legislation referred to**

Courts of Judicature Act 1964 s 78
Evidence Act 1950 s 114(g)

D **Appeal from**: Civil Appeal No W-02(IM)(NCC)-1891–09 of 2018 (Court of Appeal, Putrajaya)

Lambert Rasa-Ratnam (with Mong Chung Seng and Ding Ee Lyn) (Lee Hishamuddin Allen & Gledhill) for the appellant.
E *T Gunaseelan (with Keshvinjeet Singh) (Gunaseelan & Assoc) for the respondent.*

Harmindar Singh FCJ (delivering judgment of the court):

[1] This appeal concerns an issue of some importance to the banking F industry. The primary question for our consideration is this: under what circumstances can a bank issuing a letter of credit avoid their obligation to reimburse the negotiating bank. A further inquiry which must follow is the nature and extent of the duty of the negotiating bank in examining the documents produced under a letter of credit. In a nutshell, therefore, this G appeal turns on issues concerning letter of credit transactions and the rights and obligations of the parties involved.

[2] In the present case, the appellant ('Maybank') commenced an action against the respondent ('Punjab Bank') for reimbursement of the sum paid H under a letter of credit issued by Punjab Bank. After a full trial, the High Court on 13 August 2018 entered judgment against Punjab Bank for the sum of USD1,983,765.65 together with interest at 5% pa until date of full payment. On 18 June 2020, the Court of Appeal allowed Punjab Bank's appeal and set aside the High Court judgment. I

[3] Maybank was, however, successful in obtaining leave of this court to file an appeal on the following questions of law:

Question 1:

Where an issuing bank of a letter of credit governed by UCP-600 determines documents presented do not constitute a complying presentation, whether the issuing bank —

(a) Must give notice to the negotiating bank in accordance with article 16(c) & (d) UCP-600, irrespective of the nature of the non-compliance;

(b) Is precluded from claiming the documents presented do not constitute a complying presentation, and obliged to honour their reimbursement undertaking, if notice is not given in accordance with article 16(c) & (d) UCP-600?

(Question 1 — notice of refusal)

Question 2:

In determining whether documents presented under a letter of credit governed by UCP-600 constitute a complying presentation, whether a negotiating bank is only required to examine whether or not the documents appear on their face to constitute a complying presentation within the meaning of UCP-600?

(Question 2 — Standard for examination of documents presented under letter of credit)

Question 3:

Where a letter of credit governed by UCP-600 expressly provides it is available for negotiation by any bank in Malaysia, whether an issuing bank can avoid their obligation to reimburse the negotiating bank on grounds not stated in the notice of refusal, and which relate to the manner of negotiation of the documents presented under the letter of credit?

(Third Question — Grounds for refusal to reimburse on a letter of credit)

[4] The appeal was heard on 22 September 2021. After considering the submissions put forward by the parties, we came to the unanimous view that the appeal should be allowed. The order of the Court of Appeal was accordingly set aside and the order of the High Court restored with costs. We had indicated to the parties that a full judgment will be prepared in due course. These are now our reasons for our decision.

THE SALIENT FACTS

[5] The salient facts leading to the commencement of the action in the High Court are well stated in the judgments of the courts below and by the parties in their submissions. For the purposes of the present appeal, it will suffice for the relevant facts to be restated as follows.

[6] On or around 18 November 2011, Punjab bank, at the request of Sara International Ltd ('buyer'), issued the letter of credit ('LC') in favour of SIMS Copper Sdn Bhd ('seller') to finance the purchase of goods by the buyer from

A the seller. The LC was conveyed by Punjab Bank through a SWIFT message (a messaging service provided by the Society for Worldwide Interbank Financial Telecommunication) dated 18 November 2011 to the Royal Bank of Scotland ('RBS'), which was forwarded by RBS to Maybank on 22 November 2011. The terms of the LC were duly communicated by Maybank to the seller.

B

[7] The terms of the LC, inter alia, expressly provided:

(a) it is irrevocable and governed by the provisions of Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication No C 600 ('UCP-600');

(b) it has a value of USD1,962,500, with a tolerance of plus/minus 2% in value;

(c) it can be negotiated by any bank in Malaysia;

D

(d) it allows partial shipments of goods;

(e) Punjab Bank irrevocably undertakes to pay and reimburse the negotiating bank on the maturity of the LC, that is, 60 days from the date of the bill of lading ('reimbursement undertaking'); and

E

(f) the seller is required to present the documents specified in the LC to obtain payment.

[8] It may be convenient to observe at the outset that the UCP is a set of F comprehensive contractual rules governing letter of credit transactions. They are published by the International Chambers of Commerce ('ICC') to promote uniformity in letter of credit practice worldwide. They are settled by experts from the private sectors and are revised from time to time to address development in the banking, transport and insurance industries. Since its G inception, the UCP has been universally accepted across the world by those involved in international trade. In the instant case, the LC expressly incorporates UCP-600 which came into effect on 1 July 2007. It was common ground that the rules in UCP-600, unless expressly excluded or modified, are binding on all parties to the LC. We will need to come back to the salient terms H of the UCP-600 later on.

[9] To continue the narrative, on 24 November 2011, the seller presented the documents specified in the LC to Maybank in ten separate presentations I and requested Maybank to negotiate (ie purchase) them. On 25 November 2011, Maybank relying on the reimbursement undertaking negotiated the documents and paid a total sum of USD1,983,765.65 to the seller under the LC. Maybank claimed that payment was made after satisfying itself the documents presented, on their face, to constitute a complying presentation.

[10] On 1 December 2011, Maybank forwarded the original documents presented by the seller under the LC ('documents') to Punjab Bank by courier and sought reimbursement of the sums paid to the seller. In their cover letters enclosing the documents, Maybank expressly instructed Punjab Bank to send all communication regarding the documents to them and to remit payment to Wells Fargo Bank, New York ('Wells Fargo'). The material parts of the cover letters read:

OUR REFERENCE: 99110 WAM2155558

PUDU TRADE FINANCE CENTRE

2ND FLOOR, 418–424 JALAN PUDU

55100 KUALA LUMPUR, MALAYSIA

SWIFT: MBBEMYKLXXX

TELEX: TELEX ANSBK:

CABLE:

DOCUMENTARY CREDIT SCHEDULE

MAIL TO:

PUNJAB NATIONAL BANK

CC-21 NEHRU ENCLAVE

KALKAJI NEW DELHI 110019-INDIA

YOUR REFERENCE: 1529FLC-11204/11 DATED: 18/11/11

...

WE ENCLOSE THE FOLLOWING DOCUMENTS FOR NEGOTIATION/PAYMENT: MAILING 1 MAILING 2 DOCUMENT NAME

...

KINDLY EFFECT YOUR PAYMENT IN ACCORDANCE WITH THE INSTRUCTIONS GIVEN BELOW:

WE CERTIFY ENDORSEMENT OF DRAWING AMOUNT IS ON THE REVERSE OF THE CREDIT

WE CERTIFY DOCUMENTS RECEIVED WITHIN PRESENTATION PERIOD AND VALIDITY OF CREDIT

WE CERTIFY ALL TERMS AND CONDITIONS OF letter of credit ARE COMPLIED WITH

ADVISE ACCEPTANCE AND MATURITY DATE BY SWIFT/TELEX.

UPON PAYMENT, KINDLY REMIT PROCEEDS BY < AIRMAIL/SWIFT/TELEX > TO WELLS FARGO BANK, NEW YORK 11 PENN PLAZA 4th FLOOR NEW YORK, NY 10001 USA FOR CREDIT OF MAYBANK, KUALA LUMPUR QUOTING ABOVE REFERENCE NUMBER AND ADVISE US BY AUTHENTICATED SWIFT/TELEX OF THE AMOUNT REMITTED.

A PLEASE ALSO INSTRUCT WELLS FARGO BANK, NEW YORK 11 PENN PLAZA 4th FLOOR NEW YORK, NY 10001 USA TO ADVISE US BY AUTHENTICATED TELEX/SWIFT MT202/MT400 OF THE AMOUNT CREDITED QUOTING OUR REFERENCE NUMBER ACCORDINGLY. OUR TELEX NUMBER IS/SWIFT CODE IS MBBEMYKLAXXX.

B PLEASE ACKNOWLEDGE RECEIPT OF THIS DOCUMENTARY CREDIT SCHEDULE BY AIRMAIL.

THIS DRAWING IS SUBJECT TO UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (2007 REVISION), ICC PUBLICATION NO 600.

C ALL COMMUNICATIONS REGARDING THIS DOCUMENTARY CREDIT SCHEDULE SHOULD BE SENT TO OUR ABOVE ADDRESS QUOTING OUR REFERENCE NUMBER.

D **[11]** The documents were duly delivered to Punjab Bank on 3 December 2011. Pursuant to article 14(b) UCP-600, Punjab Bank had until 10 December 2011 to examine the documents to determine if they constituted a complying presentation. In the event that Punjab Bank considered there was no complying presentation, it could refuse to honour its reimbursement E undertaking by giving a notice of refusal.

[12] On 20 December 2011, Maybank received a SWIFT message dated the same from Punjab Bank alleging, amongst others, the bills of lading presented under the LC were discrepant ('notice of refusal'). Notably, this notice of refusal F was the first notification from Punjab Bank to Maybank. Prior to 20 December 2011, no notice of the purported discrepancies was ever sent to Maybank by Punjab Bank.

G **[13]** By SWIFT messages dated 27 December 2011 and 28 December 2011, Maybank disputed the validity of the notice of refusal and the discrepancies raised by Punjab Bank. In addition thereto, Maybank also demanded payment and reimbursement of the sum paid to the seller on 21 January 2012 which was the maturity date of the LC.

H

[14] By SWIFT message dated 30 December 2011, Punjab Bank claimed they have notified Wells Fargo of the alleged discrepancies via a SWIFT message dated 8 December 2011 ('notice of refusal'). As revealed by the evidence, this notice of refusal was only received by Maybank on 27 September I 2013.

[15] By SWIFT message dated 3 January 2012, Maybank requested Punjab Bank to seek waiver of the alleged discrepancies from the buyer and thereafter

effect payment to them. Seeking for such a waiver is a common practice for banks whenever discrepancy issues are raised about the documents presented in letters of credit transactions.

[16] On 4 January 2012, Punjab Bank informed Maybank that the buyer was not willing to waive the alleged discrepancies in the documents and that they would return the documents. Maybank received the documents on 6 January 2012. Maybank continued to follow up with Punjab Bank on the reimbursement under the LC. As payment and reimbursement was not forthcoming, Maybank commenced the instant action.

PROCEEDINGS IN THE COURTS BELOW

[17] In the High Court, Maybank sought for reimbursement of the sum of USD1,983,765.65 under the letter of credit, together with interest. Punjab Bank's defence at trial can be summarised as follows:

(a) Punjab Bank is not obliged to reimburse Maybank as the bills of lading were not compliant;

(b) the sum of USD1,983,765.65 paid by Maybank to the seller was pursuant to a loan, and not negotiation of the LC;

(c) the notice of refusal is a valid notice of refusal. Wells Fargo was Maybank's agent and had the authority to accept the notice of refusal on behalf of Maybank. Pursuant to s 182 Contracts Act 1950, Wells Fargo's knowledge of the purported discrepancies in the documents ought to be imputed to Maybank;

(d) Maybank is estopped from challenging the validity of the notice of refusal as they requested Punjab Bank to seek waiver of the purported discrepancies from the buyer and paid the charges for return of the original documents; and

(e) Maybank acted at their own risk by accepting faxed copies of the documents and making payment to the seller on 25 November 2011, without examining the original documents. Maybank also failed to prove they have received a faxed copy of all the documents before making payment to the seller.

[18] The High Court was not persuaded by the arguments raised by Punjab Bank and entered the judgment in favour of Maybank. In summary, the High Court held:

(a) pursuant to article 7(b) and (c) UCP-600, Punjab Bank is obliged to honour their reimbursement undertaking as Maybank had negotiated the letter of credit and forwarded the original documents to Punjab Bank;

(b) the bills of lading on their face complied with the terms of the LC and articles 14(I) and 20 of UCP-600. Punjab Bank's obligation to honour the reimbursement undertaking is not absolved even if the bills of lading were not compliant. To avoid liability to reimburse Maybank on the ground of discrepancy, article 16(f) of UCP-600 obliges Punjab Bank to give a notice of refusal to Maybank in accordance with article 16(c) and (d) UCP-600. However, Punjab Bank failed to give a valid notice of refusal to Maybank. They are therefore precluded from claiming the documents are discrepant;

(c) the notice of refusal is not a valid notice of refusal as it did not comply with article 16(c) of UCP-600. It was not sent to the presenter (ie Maybank) and did not state that Punjab Bank is refusing to honour. Further, the evidence shows that Wells Fargo was appointed by Maybank for the limited purpose of tracing and receiving funds under the LC. In the circumstances, the notice of refusal cannot be treated as a valid notice to Maybank; and

(d) estoppel did not apply against Maybank as there was no representation by Maybank that they acknowledged the purported discrepancies and validity of the notice of refusal.

[19] Against this decision, Punjab Bank appealed to the Court of Appeal. The appeal was allowed and the decision of the High Court was set aside. In summary, the Court of Appeal held:

(a) it is well accepted that banks must apply the principle of strict compliance with the terms of the letter of credit. In this case, it was a condition precedent of the letter of credit that an ocean bill of lading must be presented. The letter of credit expressly provides a freight forwarder bill of lading is not acceptable;

(b) a freight forwarder bill of lading is a weak form of document as compared to an ocean bill of lading. An ocean bill of lading is issued by the owner or charterer of the ship which evidences that goods have been loaded on the ship. It gives full details of the carrier and the type, quantity and destination of the goods. However, a freight forwarder bill of lading is more of a domestic bill and there is no assurance that goods have actually been loaded on the ship. Therefore, it is not a surprise that Punjab Bank on the instruction of the buyer had excluded it from the letter of credit;

(c) article 1 UCP-600 allows freight forwarder bills of lading to be expressly

excluded even where the letter of credit is governed by UCP-600. Article 20 ought to be read with article 1. The bills of lading presented by the seller were freight forwarder bills of lading. Releasing payment based on freight forwarder bills of lading amounted to a fundamental breach of the terms of letter of credit and the issue of discrepancy does not arise at all;

(d) article 16 UCP-600 relates to discrepant documents. However, non-production of an ocean bill of lading amounted to a fundamental breach of the terms of the letter of credit. Thus, it is not an issue of discrepancy and the requirement of a notice of refusal is not applicable. Even if there is such requirement, a proper notice of refusal has been given on the special facts of this case.

(e) non-compliance with the requirements of a notice of refusal is also technical in nature as the negotiation took place on 25 November 2011 based on faxed copies of the documents presented by the seller. The documents sent by fax and handed over subsequently cannot be good for negotiation at all; and

(f) it is not in dispute that the money was disbursed to the seller before the maturity date of the letter of credit. In light of this and many sham methodologies not consistent with the terms of the letter of credit, it would be prudent for Maybank to have called the seller as a witness. However, Maybank failed to do so and it adds credibility to Punjab Bank's case that the early payment had to do with a separate loan transaction between Maybank and the seller.

OUR ANALYSIS AND DECISION

[20] As observed at the outset, Maybank successfully obtained leave to appeal to this court on three questions. Much of the same arguments were canvassed before us. In essence, Maybank claimed that the Court of Appeal had significantly departed from widely accepted international rules governing letters of credit, particularly the UCP-600. Hence it was necessary for this court to consider and determine important questions which have now arisen, concerning letter of credit transactions and the rights and obligations of the parties involved.

[21] In this respect, we considered that it would be convenient to decide on the issues which arise from the leave questions in the order as set out at the outset. However, as there is considerable overlapping in the arguments advanced for Questions 1 and 2, they ought to be considered and determined together.

Question 1 — Notice of refusal

Question 2 — Standard for examination of documents presented under letter of credit

[22] In this context, in view of the pronouncements by the Court of Appeal, it is necessary to come back to certain relevant yet fundamental rules in UCP-600. Both parties had accepted they were bound by the rules in UCP-600 under the LC. Firstly, a letter of credit is a separate transaction from the underlying contract between the buyer and the seller. It follows that the duty of a bank to negotiate under the letter of credit is not subject to claims or defences taken under the underlying contract (article 4, UCP-600). Secondly, banks deal with documents and not with goods, services or performance to which the documents may relate (article 5, UCP-600). Thirdly, an issuing bank (in this case Punjab Bank) is irrevocably bound to honour as of the time it issues the letter of credit (article 7(b), UCP-600).

[23] Fourthly, an issuing bank undertakes to reimburse a nominated bank (in this case Maybank) that has honoured or negotiated a complying presentation under the letter of credit and forwarded the documents to the issuing bank. Reimbursement for the amount of a complying presentation under a credit is due at maturity, whether or not the nominated bank prepaid or purchased before maturity. An issuing bank's undertaking to reimburse the nominated bank is independent of the issuing bank's undertaking to the beneficiary (article 7(c), UCP-600).

[24] On the next question of the duty and obligation of the issuing and nominated bank when faced with letter of credit transactions, the following rules apply. A nominated bank and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether the documents appear on their face to constitute a complying presentation (article 14(a), UCP-600).

[25] A nominated bank and the issuing bank each have a maximum of five banking days following the day of presentation to determine if a presentation is complying (article 14(b), UCP-600). If a nominated bank or the issuing bank decides to refuse to honour or negotiate, it must give a single notice to that effect to the presenter. The notice must specify the matters set out in article 16(c)(i), (ii) and (iii), and be given to the presenter no later than the close of the fifth banking day following the day of presentation (article 16(c) and (d), UCP-600). If an issuing bank fails to act in accordance with the provisions in article 16, it shall be precluded from claiming that the documents do not constitute a complying presentation (article 16(f), UCP-600).

[26] Coming now to questions 1 and 2, the Court of Appeal took the position, rather unfortunately in our view, that the requirement of a notice of

refusal was not applicable as the non-production of an ocean bill of lading was not a discrepancy but a fundamental breach. The Court of Appeal appeared to have accepted Punjab Bank's suggestion that a notice of refusal is not required where the documents presented are in breach of a fundamental term of the letter of credit. With respect, this view is plainly untenable as it goes against the express provisions in article 16 of UCP-600 and is not supported by any authority. It is well-settled that article 16 of UCP-600 imposes a strict obligation on an issuing bank to give notice of refusal to the negotiating bank, if they refuse to honour their reimbursement undertaking on the ground the documents do not constitute a complying presentation (see *China New Era International Ltd v Bank of China (HK) Ltd & Ors* [2010] 5 HKC 82). We also note that the strict requirements for a notice of refusal is a common feature of international letter of credit transactions.

[27] In the present case, Punjab Bank was fully aware of the requirements of the notice of refusal. Punjab Bank claimed consistently that the bills of lading presented to Maybank did not comply with the terms of the LC. Their refusal to honour their reimbursement undertaking was premised solely on the claim that the documents contained discrepancies. This was reflected in the notice of refusal which listed the discrepancy as 'FREIGHT FORWARDER BILL OF LADING NOT ACCEPTABLE AS PER LC CLAUSE 47B-G'. It was therefore not surprising that in the proceedings in the courts below, it was common ground between the parties that whether the bills of lading were compliant or otherwise went to the issue of discrepancy.

[28] In any event, the ground relied upon by Punjab Bank in that the bills of lading presented by the seller did not comply with the LC as they were issued and signed by a freight forwarder, Diffreight Agencies (M) Sdn Bhd, was wholly untenable. Contrary to Punjab Bank's claim, a cursory look at the bills of lading do not show they were issued and signed by a freight forwarder. On their face, the bills of lading were signed by Diffreight Agencies (M) Sdn Bhd, as agent on behalf of the carrier Diffreight. There is nothing on the face of the bills of lading which indicated that Diffreight Agencies (M) Sdn Bhd is a freight forwarder.

[29] In this context, Maybank's witness (PW1) unequivocally denied that the bills of lading presented appeared to be freight forwarder bills of lading. Although Punjab Bank's witness (DW1) claimed otherwise, no evidence was led to prove that Diffreight Agencies (M) Sdn Bhd was a freight forwarder. We were therefore persuaded that this claim of the bills of lading being issued and signed by a freight forwarder remained as a bare assertion and in the circumstances the claim was wholly misconceived.

[30] At any rate, even if it was established that Diffreight Agencies (M) Sdn Bhd was a freight forwarder, the fact that they signed 'as agent of behalf of the carrier Diffreight' meant that the bill of lading was indeed an ocean bill of lading. It could not therefore be a freight forwarder's bill of lading as accepted by the Court of Appeal.

[31] This hearkens back to the issue of the standard of examination of documents presented under a letter of credit. The bank examining a presentation is only required to examine whether the documents appear on the face to constitute a complying presentation (article 14(a), UCP-600). Banks are not required to go beyond the face of the document. To impose a duty to investigate beyond the documents, as suggested by the Court of Appeal here, is both unrealistic and burdensome to banks. In the commercial world, prompt payments are often crucial and it would not be commercially justified for banks to hire investigators to go behind shipping transactions or other arrangements as they might do in the insurance industry. The efficacy of letters of credit, which are the lifeblood of international trade, may then be severely undermined. It is therefore sufficient for banks 'to examine documents with reasonable care to ascertain that they appear on the face to be in accordance with the terms and conditions of the credit' (*Gian Singh & Co Ltd v Banque de L'Indochonie* [1974–1976] SLR(R) 83).

[32] Now, with respect, the Court of Appeal appears to have conflated the separate issues of strict compliance with the terms of a letter of credit with the standard for examination of documents under UCP-600. Accordingly, it was erroneous for the Court of Appeal to have insisted that Maybank should be concerned whether the goods under the LC had been shipped or delivered to the buyer. This finding was contrary to the well-established rule that in letter of credit transactions, banks deal with documents and not with goods.

[33] In the circumstances, and as found by the High Court, Maybank was justified in saying the bills of lading presented by the seller in this case appear on their face to constitute a complying presentation. Accordingly, we would answer both questions 1 and 2 in the affirmative.

Third question — Grounds for refusal to reimburse on a letter of credit

[34] The third question arises from the decision of the Court of Appeal concerning the manner of negotiation of the documents by Maybank. In this context, the Court of Appeal held:

(a) Maybank acted on a frolic of their own by negotiating the letter of credit on 25 November 2011 based on faxed copies of the documentspresented by the seller;

(b) the money was disbursed by Maybank to the seller before the maturity date of the letter of credit, pursuant to a loan granted to the seller; and

(c) Maybank should have called the seller to give evidence as there were many sham methodologies not consistent with the terms of the letter of credit. As Maybank has failed to call the seller as a witness, it adds credibility to Punjab Bank's case that the early payment was to do with a separate loan transaction and s 114(g) of the Evidence Act 1950 ought to be invoked against Maybank.

[35] The legal position in this regard is well-settled. First and foremost, pursuant to article 16 of UCP-600, an issuing bank must give a single notice of refusal to the negotiating bank if they wish to refuse to honour on the ground of non-compliance with the terms of the letter of credit. If the issuing bank fails to raise a particular ground in its notice of refusal, it is precluded from raising it after the expiry of the period stipulated for giving a notice of refusal.

[36] In this case, Punjab Bank's sole reason for rejecting the documents at the material time was due to alleged discrepancies in the documents. Punjab Bank did not raise any issue on the manner of negotiation of the documents in their notice of refusal to Maybank. In the circumstances, on settled principles, Punjab Bank is not entitled to raise these issues to avoid their obligation to reimburse Maybank.

[37] In any case, these issues are plainly without merit as Maybank, being the negotiating bank, is fully entitled to determine the manner of negotiation of the documents. They were entitled to pay the seller in advance, in anticipation of receipt of a complete set of the original documents. The Hong Kong Court of Appeal in *China New Era International Ltd v Bank of China (HK) Ltd & Ors* [2010] 5 HKC 82 had occasion to deal with this very issue and we find no difficulty in agreeing with the views expressed by Stone J in the following terms:

> [51] The short point, it seems to me, is that as a matter of interpretation there is within art 7c no stipulation to the effect that payment cannot be made to the beneficiary by the negotiating bank until there is a fully compliant presentation, and not before.
>
> [52] The precise manner of negotiation of the documents must be a matter for the negotiating bank; hence if it wishes to make payment under the credit in anticipation (as in the instant case) of submission of a compliant document in lieu of one that is not compliant (vide the two initially discrepant cargo receipts) it does so at its own commercial risk, such risk often being covered by a beneficiary's indemnity that if ultimately a 'complying presentation' cannot be achieved, then such payment as made will be returned to the paying bank.
>
> [53] However, such discrete commercial arrangement — to which of course the issuing bank is not privy — does not affect the cardinal principal that, under art 7c,

A the issuing bank undertakes to reimburse the nominated bank that has honoured or negotiated a 'complying presentation', and thereafter has forwarded the documents constituting such compliant presentation to the issuing bank.

[54] Thus, if the documents as forwarded are found not to be compliant, there will be no obligation so to reimburse; conversely, if such documents are accepted as B compliant, the unequivocal obligation arises upon the issuing bank to make reimbursement to the negotiating bank of the payment as earlier made to the beneficiary (or assignee thereof) by that bank.

[55] In my judgment there is, and can be, no remit for the argument — which is precisely that advanced in the present appeal by BOC — that *qua* issuing bank its C reimbursement obligation is therefore effectively dependent upon not one but two distinct factors: first, the fact of a 'complying presentation', with the documents comprising such presentation being forwarded by the bank which has taken up the documents and has effected payment under the credit, plus a second factor, namely that the issuing bank is entitled to decline reimbursement, notwithstanding full D documentary compliance with the terms of the credit, because at the time of payment by the nominated bank, such a 'complying presentation' had not been effected.

[56] If this interpretation of art 7c were correct, which clearly it is not, the surprising (and wholly unintended) result would enure that prior to effecting reimbursement, E in addition to ensuring that the documents as forwarded to it indeed constituted a 'complying presentation', the obligation of the issuing bank so to reimburse will not crystallise until it also be established that such payment as was effected by the nominated bank did not antedate an ultimately compliant presentation.

[57] In my view, the argument that the issuing bank therefore is entitled to 'vet' or F oversee the manner of negotiation by the bank which has made payment under the credit, and thereafter to justify its refusal to reimburse in face of a compliant presentation, possesses neither merit nor commercial justification, and I suspect that this is the very reason that leading counsel on either side apparently have been unable to locate any authority on the point.

G

[38] It is also pertinent to note that at the trial, DW1 admitted Punjab Bank received the complete set of original documents from Maybank on 3 December. Pursuant to article 7(b) of UCP-600, Punjab Bank's obligation to reimburse Maybank arose upon receipt of the original documents. In short, the H manner of negotiation of the documents was, in our view, wholly irrelevant to Punjab Bank's obligation to reimburse Maybank.

[39] Further, the essence of 'negotiation' in a letter of credit transaction is the purchase of documents by the negotiating bank by advancing funds to the I beneficiary and thereafter, presenting the documents in their own rights to the issuing bank for reimbursement. This is expressly provided for in article 2 of UCP-600:

> Negotiation means the purchase by the nominated bank of drafts (drawn on a bank other than the nominated bank) and/or documents under a complying

presentation, by advancing or agreeing to advance funds to the beneficiary on or before the banking day on which reimbursement is due to the nominated bank.

[40] Thus, payment by Maybank to the seller before the maturity date of the letter of credit was entirely consistent with negotiation of the documents presented by the seller under the letter of credit. With respect, the Court of Appeal was plainly wrong to hold that the payment had to do with a separate loan transaction between Maybank and the seller. As correctly held by the High Court, the evidence at trial clearly showed Maybank paid the sum of USD1,983,765.65 to the seller pursuant to negotiation of the documents under the letter of credit. There was therefore no need for Maybank to call the seller as a witness. Their cause of action against Punjab Bank was for reimbursement of the sum paid under the letter of credit. In the circumstances, the Court of Appeal was also plainly wrong to invoke an adverse inference against Maybank for failing to call the seller as a witness.

[41] In summary, the issues raised by Punjab Bank concerning the manner of negotiation of the documents clearly did not constitute a defence to Maybank's claim. The Court of Appeal was therefore plainly wrong to have reversed the High Court's finding in this regard and to hold that Maybank's conduct is a sham. In the circumstances, question 3 should be answered in the negative.

CONCLUSION

[42] In conclusion, and for the reasons mentioned, we found merit in the issues raised by the appellant. The appeal was therefore allowed with costs. The order of the Court of Appeal was accordingly set aside and the order of the High Court restored. Since the delivery of the decision, our learned sister Zaleha Yusof FCJ has since retired. This grounds of judgment is therefore prepared in accordance with s 78 of the Courts of Judicature Act 1964.

Order of the Court of Appeal was accordingly set aside and the Order of the High Court restored.

Reported by Ashok Kumar